LOH KOK HUAH, RE: EX P; BAN HIN LEE BANK BHD.

HIGH COURT MALAYA, PENANG
MOHAMED DZAIDDIN J
[BANKRUPTCY NO. 29-65-90]
27 JUNE 1991

BANKRUPTCY: *Receiving order - Whether properly made - Amount of debt disputed - Judgment creditor received proceeds of sale of property of principal debtor - Requisite notice if intent to dispute petition - Proceeds of sale only received by creditor after filing of creditor's petition - Effect of - Requirement of statutory minimum of RM2,000 - Bankruptcy Act 1967, s. 3(2)(ii) - Bankruptcy Rules 1969, r. 117.*

A bankruptcy notice dated 15 January 1990 was served on the debtor by way of substituted serviced for the amount of RM249,606.36 being amount owed by the debtor as a guarantor under a final judgment. As he did not comply with the bankruptcy notice, the bank proceeded to file a creditor's petition seeking a receiving order against the debtor.

Although the debtor did not file a notice of intention to oppose the petition under r. 117 of the Bankruptcy Rules 1969, the debtor on 13 February 1991 filed an affidavit opposing this petition on the ground that the judgment sum as stated in the creditor's petition was incorrect as the bank had failed to deduct a sum of RM181,282.50 being the proceeds of sale of the charged property belonging to the principal debtor which was auctioned under s. 263 of the National Land Code 1965.

Held:

[1] The debtor cannot raise the issue that the judgment sum stated in the creditor's petition was incorrect unless he has given notice to the bank under s. 3(2)(ii) of the Bankruptcy Act 1967 (the Act).

[2] The debtor had knowledge of the application for an order for sale of the charged property and therefore should have applied to set aside the bankruptcy notice disputing the validity of the said notice. However, this issue of correct amount was only raised at the hearing of the creditor's petition on 20 May 1991. The bankruptcy notice cannot be invalidated by reason of the mistake as to the sum specified therein.

[3] When the creditor's petition was filed on 9 April 1990, the bank (judgment creditor) had not received the proceeds of the sale; therefore the amount claimed in the bankruptcy notice was the sum actually due from the debtor to the bank as at the time when the creditor's petition was filed.

[4] The Court can still make a receiving order even if the debt had been substantially reduced, as long as the debt exceeded the statutory minimum of RM2,000 and remains due and owing at the date of the hearing of the petition.

[Receiving and adjudicating order made against the debtor.]

Cases referred to:
In re Child; ex parte Child [1892] 2 QB 77 ***(cit)***
Re Arunachalam; ex parte Indian Overseas Bank Ltd. [1968] 1 MLJ 89 ***(foll)***
Re Patel (a debtor) [1986] 1 All ER 522 ***(cit)***

Legislation referred to:
Bankruptcy Act 1967, ss. 3(2)(ii), 5(1)(a), 6(2)
Bankruptcy Rules 1969, r. 117
National Land Code 1965, s. 263

For the judgment creditor - Lian Siew Ling; M/s. Murad & Foo
For the judgment debtor - Yeang Kok Kheang; M/s. K.S. Choo & Co.

[**Editor's Note:** The debtor has appealed to the Supreme Court]

JUDGMENT

Mohamed Dzaiddin J:

This petition, which is now under appeal before the Supreme Court, raises a question whether a receiving order can properly be made when the debt upon which the bankruptcy petition is founded has on the date of hearing of the petition been substantially reduced by reason of the judgment creditor receiving the proceeds of sale of the property of the principal debtor.

The facts of the case are these. The bankruptcy notice, issued out of this Court on 15 January 1990, was served on the debtor by way of substituted service requiring the debtor within seven days after service to pay the bank the judgment sum amounting to RM249,606.36 being the amount due and owing by the debtor as a guarantor under a final judgment in Penang High Court Civil Suit No. 23-274-88. The bankruptcy notice was not complied with by the debtor and on 9 April 1990 the bank proceeded to file a creditor's petition seeking for a receiving order against the debtor as he was justly and truly indebted to the bank in the aggregate of the sum of RM249,606.36 being the amount stated under the bankruptcy notice. When the petition was first heard on 31 December 1990, the debtor's Counsel informed me that the debtor intended to object to the petition. On checking the file, I discovered that the debtor did not file a notice of intention to oppose the petition under r. 117 of the Bankruptcy Rules 1969. However, on 13 February 1991, he filed his affidavit (lampiran 19) opposing this petition, the main ground being that the judgment sum as stated in the creditor's petition was incorrect as the bank had failed to deduct a sum of RM181,282.50 being the proceeds of sale of the charged property belonging to the principal debtor which was auctioned under s. 263 National Land Code.

After hearing Encik Yeang on 20 May 1991, I held there was no merit in the objection and accordingly I made a receiving and adjudicating order against the debtor. My reasons are these. First, it is clear to me that the debtor cannot raise the above issue unless he has given notice to the bank under s. 3(2)(ii) of the Bankruptcy Act 1967. The sub-section reads as follows:

Provided that a bankruptcy notice:

> (ii) Shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of such mistake; but if the debtor does not give such notice he shall be deemed to have complied with the bankruptcy notice, if within the time allowed he takes such steps as would have constituted compliance with the notice had the actual amount due been correctly specified therein.

Quite clearly, in the present case the debtor was aware about the application for an order for sale of the charged property of the principal debtor and ought to have applied to set aside the bankruptcy notice disputing the validity of the said notice. Yet it was only at the hearing

of the creditor's petition on 20 May 1991 that he raised about the correct amount. In the circumstances, the bankruptcy notice cannot be invalidated by reason of the mistake as to the sum specified therein. To enforce my reason, I adopt the decision of Chang Min Tat J (as he then was) in *Re Arunachalam; ex parte Indian Overseas Bank Ltd.* [1968] 1 MLJ 89 at p. 90:

> On the authorities, it seems to me reasonably clear that where an excess is claimed in the bankruptcy notice and no such notice of dispute of the validity of the notice by reason of such excess is given, then the bankruptcy notice is not invalid merely by reason of the excess.
>
> Where the amount claimed in the bankruptcy notice is in excess and notice, as is referred to in the proviso the s. 3(2) of the Ordinance, is given within seven days after the service of the bankruptcy notice, then the excess becomes relevant and on the authorities the bankruptcy notice is invalid, since it referred to a sum in respect of which the judgment creditor could not have issued execution: In *re Child, ex parte Child* [1892] 2 QB 77.

Secondly, based on the affidavits of Khoo Khay Seang, the bank's manager, affirmed on 8 March 1991 and 29 May 1991 respectively, I found as a fact that no money was received by the bank from the Pentadbir Tanah Daerah, Daerah Timur Laut, until after the creditor's petition was filed. The property in question, that is, Lot 3741, bearing title Grant Mukim 132, Mukim 18, Daerah Timur Laut, Pulau Pinang was sold under s. 263 National Land Code on 10 January 1990 for RM183,500 when a 10% deposit was paid to the Pentadbir Tanah Daerah. The balance of the purchase price was paid on 7 April 1990 in compliance with the condition of sale which fixed the completion date to be three months after the sale. The full purchase price of RM183,500 was finally paid to the bank under s. 268 on 17 June 1990. Therefore, when the creditor's petition was filed on 9 April 1990 the bank had not been paid the sum of RM183,500. Hence, the amount claimed in the bankruptcy notice, that is, RM249,606.36 remained as the amount actually due from the debtor to the bank as at the time when the creditor's petition was filed.

Thirdly, in my opinion, where the judgment debt on which the bankruptcy petition is founded has, by the date of the hearing of the petition, been substantially reduced, this Court can still make a receiving order unless the debt was less than the statutory minimum of RM2,000 since on the true construction of s. 6(2) read with s. 5(1)(a) of the Act it is necessary to prove that a debt exceeding the statutory minimum of RM2,000 is still due and owing to the bank at the date of the hearing of the petition. (See: *Re Patel (a debtor)* [1986] 1 All ER 522.)

Also found at [1991] 3 CLJ 1817